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8 AquAlliance

9 California Water Impact Network

10 **BEFORE THE**

11 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

12 HEARING IN THE MATTER OF  
13 CALIFORNIA DEPARTMENT OF WATER  
14 RESOURCES AND UNITED STATES  
15 BUREAU OF RECLAMATION  
16 REQUEST FOR A CHANGE IN POINT OF  
17 DIVERSION FOR CALIFORNIA WATER  
18 FIX

19 **RESPONSE TO THE OBJECTIONS OF  
20 SAN LUIS AND DELTA-MENDOTA  
21 WATER AUTHORITY AND THE  
22 DEPARTMENT OF WATER  
23 RESOURCES TO THE EXHIBITS OF  
24 CSPA ET AL. (AQUALLIANCE,  
25 CALIFORNIA SPORTFISHING  
26 PROTECTION ALLIANCE AND  
27 CALIFORNIA WATER IMPACT  
28 NETWORK) FOR PART 1B**

19 **I. INTRODUCTION**

20 The CSPA parties<sup>1</sup> submit the following response to December 30, 2016 objections of the  
21 San Luis and Delta-Mendota Water Authority (Water Authority) and the Department of Water  
22 Resources (DWR) to the exhibits submitted in support of our Part 1B cases in chief. For the  
23 reasons discussed below, these objections are without merit. The offered evidence is relevant,  
24 reliable, and is the type of evidence that the SWRCB and water users are accustomed to relying  
25 upon in the course of their work.

26 \_\_\_\_\_  
27 <sup>1</sup> AquAlliance, California Sportfishing Protection Alliance (CSPA), and California Water Impact Network (C-WIN).

1 DWR and the Water Authority have had our testimony and exhibits for months and  
2 cannot claim surprise. The CSPA parties supplied the State Board with a detailed protest stating  
3 our case. We supplied substantial testimony, supporting scientific literature, and relevant and  
4 reliable public records supporting that testimony. Now, after limited cross-examination of our  
5 experts in the hearing, DWR and the Water Authority have submitted objections to a multitude  
6 of our exhibits, based on standards used in civil trials. The objections themselves are broad,  
7 unsupported, and overly general. Many objections simply state that exhibits lack relevance and  
8 foundation.

9 The CSPA parties respectfully request that the Hearing Officers overrule the objections in  
10 their entirety and incorporate all of our exhibits into the record.

11 **II. RESPONSE TO OBJECTIONS OF SAN LUIS AND DELTA MENDOTA**  
12 **WATER AUTHORITY TO OBJECTIONS**

13 The Water Authority object to the majority of the exhibits of the CSPA parties on the  
14 grounds that the exhibits are hearsay.

15 In California courts, Evidence Code §1280 provides that statements in official records of  
16 a public agency are not hearsay as long as the following conditions are met:

- 17 a) The writing was made by and within the scope of duty of a public employee.
- 18 b) The writing was made at or near the time of the act, condition, or event.
- 19 c) The sources of information and method and time of preparation were such as to  
20 indicate its trustworthiness.

21 Thus, statements in official publications or records of public agencies are not hearsay.

22 To the extent that expert witnesses reference scientific journal articles, technical reports,  
23 or other publications in their testimony, these documents are part of the information supporting  
24 the expert's opinion, and would be admissible in civil trials. California law allows an expert to  
25 base his or her opinion upon technical reports and scientific literature, provided the matter is "of  
26 a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to  
27

1 which his testimony relates.” [Evid. Code, §801(b); *People v. Bui* (2001) 86 Cal.App.4<sup>th</sup> 1187,  
2 1196.]

3         Judged by these standards, all of the objections of the Water Authority should be  
4 overruled.

### 5         **III. GENERAL RESPONSE TO OBJECTIONS OF DWR**

6         Any objections of DWR based on claims of hearsay should be overruled on the same  
7 basis as should the objections of the Water Authority, as discussed *supra*.

8         DWR also makes numerous objections to exhibits on grounds of relevance. The  
9 objections should also be overruled. The exhibits DWR seeks to exclude are relevant to the  
10 WaterFix Change Petition.

11         In trial court proceedings, “relevance” means that evidence has a tendency in reason to  
12 prove or disprove any disputed fact of consequence to the determination of the action, including  
13 the credibility of a witness or hearsay declarant. [Evid. Code §210, *People v. Nelson* (2008) 43  
14 Cal 4<sup>th</sup> 1242, 1266.] To be relevant, the evidence must relate to some matter raised by the  
15 pleadings, pretrial orders or applicable, substantive law and have probative worth (i.e. some  
16 logical tendency to prove the matter at issue). [*Winfred D. v. Michelin North America, Inc.*  
17 (2008) 165 Cal.App. 4<sup>th</sup> 1011, 1029.] All of the exhibits DWR seeks to exclude meet this  
18 standard.

19         Formal authentication of documents is not required under the Board’s adopted  
20 regulations. [Cal. Code Regs. Tit.23 §648.5.1, Govt. Code §11513(c).] It has been the practice  
21 of the Board in past hearings to admit public agency reports and records, scientific journal  
22 publications, newspapers and other articles, and published maps based on *prima facie*  
23 considerations. If DWR and the Water Authority had questions about any of these exhibits, they  
24 could have asked them on cross-examination. For this reason, these categories of documents  
25 should be generally admitted into evidence without requiring further foundation.

1 The State Board itself prepared some of the additional documents that Mr. Jennings and  
2 Dr. Lee used as foundational exhibits for their opinions and conclusions that approval of the  
3 change in point of diversion would injure water users. Some of the information that DWR  
4 would now propose to strike as hearsay was prepared by independent governmental agencies.  
5 This foundational information is admissible, reliable, and is exactly the kind of information on  
6 which the State Board is “accustomed to rely in the conduct of serious affairs.” (*Aengst v.*  
7 *Board of Medical Quality Assurance* (1980) 110 Cal.App. 3d 283.)

#### 8 **IV. RESPONSES TO SPECIFIC OBJECTIONS OF DWR**

##### 9 **A. RESPONSE TO OBJECTIONS TO THE EXHIBITS OF AQUALLIANCE**

10 In their Feb. 11, 2016 Ruling, the Hearing Officers clarified the scope of issues for Part 1,  
11 stating: “[G]enerally Part 1 focuses on human uses of water (water right and water use  
12 impacts).” The Ruling also stated: “Part 1 can address human uses that extend beyond the strict  
13 definition of legal users of water.” P. 10

14 DWR objects to almost the entire testimony of AquAlliance by saying: “All testimony  
15 regarding future groundwater transfers and the cumulative impacts of those transfers on  
16 groundwater aquifers in the northern Sacramento Valley is speculative and irrelevant to the  
17 current proceeding.” DWR Objections, p. 16. This shotgun effort to exclude an entire subject  
18 of testimony is meritless, and the hearing officers should emphatically reject it. DWR argues on  
19 p. 18 of its Objections: “[T]he proposed WaterFix ... does not include water transfers.” Exhibit  
20 CSPA-41 clearly rebuts this contention. Exhibit CSPA-41, quoting RDEIR/SDEIS p. 4.3.1-9,  
21 says: “Alternative 4 provides ... additional capacity to move transfer water from areas upstream  
22 of the Delta to export service areas and provides a longer transfer window than allowed under  
23 current regulatory restraints. ... CEQA conclusion: Alternative 4A would increase water transfer  
24 demand compared to existing conditions.”

25 The testimony and supporting exhibits of AquAlliance detail the potential effects of the  
26 WaterFix project on overlying groundwater users in the Sacramento Valley upstream of the  
27

1 WaterFix diversions on the lower Sacramento River. Since the WaterFix facilities propose to  
2 capture additional flows from upstream in additional months of the water year, the testimony of  
3 Barbara Vlamis and Kit Custis is relevant and reliable in showing how overlying water rights  
4 holders could be harmed by depriving such users of groundwater and substantial groundwater  
5 recharge into their underground aquifers.

6 The evidence submitted as foundation for these potential effects consists of exhibits  
7 documenting the existing effects and the recent history of groundwater substitution programs of  
8 the Bureau and DWR. These exhibits are cited, relied on and referenced in the testimony of  
9 Barbara Vlamis, Kit Custis and Jim Brobeck. Providing the State Board with this information  
10 and context can only help to inform the State Board's decision in regard to the beneficial uses of  
11 water that would be affected by the approval of this change in point of diversion.

12 Additionally, the State Board has asked whether, should the petition be granted, any  
13 specific conditions should be included to avoid injury. Notice of Petition, p. 11. The testimony  
14 and exhibits offered by AquAlliance are relevant information to allow the State Board to  
15 consider whether or not to condition DWR's permit to change its point of diversion to preclude  
16 or limit the use of the WaterFix project to transfer groundwater from the aquifers of the  
17 Sacramento Valley. Additional surface water sales to exporters south of the Delta would deplete  
18 the groundwater of the Sacramento and harm the present water users in the Sacramento Valley  
19 and the Delta. A slick double-dipping caused by the sale by surface water contractors of their  
20 surface water allocations, and replacement of sold water with pumped groundwater, has  
21 tremendous potential to harm upstream water users and their priority rights under California  
22 water law (Article 10, Section 2, California Constitution). It also, in the long term, harms export  
23 contractors because of the long-term depletion of surface flows that might otherwise be  
24 available for export.

1                   **B. RESPONSE TO OBJECTIONS TO THE EXHIBITS OF C-WIN**

2                   DWR objects to the one word revision in the written testimony of Arve Sjovold. This  
3 revision was an erratum that Mr. Sjovold identified prior to certifying that his written exhibit  
4 was a true and correct statement of his testimony. The revision should be treated as such, and  
5 the objection to Mr. Sjovold’s written testimony (CWIN-3-revised2) should be overruled.

6                   DWR objects to the revision of a paragraph in the report prepared by Ed Whitelaw  
7 (CWIN-6-Revised) in support of his testimony. Dr. Whitelaw submitted the revised paragraph  
8 at the time of his appearance to summarize his testimony and to undergo cross-examination. Dr.  
9 Whitelaw certified the revision as part of a true and correct copy of the exhibit. The Chief  
10 Hearing Officer accepted the revision at that time without objection from DWR, and a written  
11 copy was available to DWR as the basis for cross-examination. DWR did not cross-examine on  
12 the paragraph. The revision was incorporated clearly in redline strikethrough format into the  
13 exhibit submitted by CSPA parties as CWIN-6-REVISED and moved into evidence. Since the  
14 Chief Hearing Officer accepted the revised paragraph at the time it was certified as true and  
15 correct, and since DWR did not offer an objection at the time the revision was proffered, the  
16 objection to Ed Whitelaw’s written testimony should be overruled.

17                   **C. RESPONSE TO OBJECTIONS TO THE EXHIBITS OF CSPA**

18                   DWR objects to exhibits CSPA-19, CSPA-58 and CSPA-59. These are comment letters  
19 written by Bill Jennings (CSPA-19) on the BDCP DEIR/DEIS and by Dr. G. Fred Lee (CSPA-  
20 58 and CSPA-59) on the BDCP DEIR/DEIS and the WaterFix RDEIR/SDEIS respectively.<sup>2</sup>

21 DWR objects that these lack foundation and that they lack relevance.

22                   Mr. Jennings and Dr. Lee prepared these documents, and the facts within these  
23 documents are known to them from their work over the years on the WaterFix and its  
24 predecessor, the BDCP. The petitioners’ WaterFix project is supported by an DEIR/DEIS and  
25

26 \_\_\_\_\_  
27 <sup>2</sup> DWR makes similar objections to AquAlliance comment letters on BDCP/WaterFix, AQUA-33 and AQUA-41. The  
28 response in this section equally applies to those exhibits.

1 RDEIR/SDEIS that purport to address some of the same subjects that Mr. Jennings and Dr. Lee  
2 incorporated from their comment letters into their testimony: use of modeling, reliance on data  
3 sets, and numerous analytical metrics related to water quality parameters. In their testimony,  
4 Mr. Jennings and Dr. Lee make the same use of their comments on the DEIR/DEIS and  
5 RDEIR/SDEIS that petitioners' witnesses Jennifer Pierce, Gwen Bucholtz, and Maureen Sergent  
6 made in their testimony of the DEIR/DEIS and RDEIR/SDEIS themselves. They all took  
7 conclusions from their respective documents and applied them as the basis for their testimony in  
8 Part 1. Mr. Jennings and Dr. Lee do not make a CEQA/NEPA inadequacy argument; they  
9 simply provide factual information and analysis drawn from their comments letters and then  
10 provide information from other government documents for the Hearing Officers' consideration.

11 DWR argues that the revised testimony of Bill Jennings (CSPA-2-Revised-2) fails to  
12 comply with the Hearing Officers' November 23, 2016 ruling regarding scope of testimony in  
13 Part 1. That ruling stated in relevant part:

14 The written testimony of Bill Jennings has been revised to exclude some of his proposed  
15 testimony concerning environmental impacts, but some testimony on this subject  
16 remains, including testimony concerning the adequacy of adaptive management to protect  
17 fisheries and application of the public trust doctrine. The testimony on those subjects at  
18 the following locations is stricken:

19 Page 3, first paragraph, last sentence

20 All of section VII, beginning on page 19, except the first three paragraphs and the last  
21 two paragraphs

22 All of section VIII, beginning on page 25, except the first two sentences of the first  
23 paragraph and the last two sentences of the second paragraph

24 In our November 30, 2016 *Response To Objections, other than Those Regarding Scope of*  
25 *Testimony, to the Testimony of CSPA et al. (AquAlliance, California Sportfishing Protection*  
26 *Alliance and California Water Impact Network) for Part 1b*, CSPA parties requested that the  
27 Hearing Officers reconsider their November 23 ruling on certain aspects of the written  
28 testimony of Mr. Jennings. Specifically, we requested reconsideration regarding discussion of

1 adaptive management since numerous DWR witnesses had testified that adaptive management  
2 in the implementation of WaterFix would help to prevent injury to other water users.

3 Consistent with this request, Mr. Jennings eliminated all “testimony on those subjects,”  
4 i.e., all references to fish and wildlife in his testimony on adaptive management. He added the  
5 following explanation in his revised written testimony: “The following testimony regarding  
6 adaptive management is not intended to specifically address fish and wildlife but rather to  
7 address the historic and egregious failure of agencies and programs to successfully implement  
8 the concept of adaptive management.”

9 During his oral testimony, Mr. Jennings stated:

10 Despite the absence of any final adaptive management plan, project proponents envision  
11 that adaptive management will guide future management decisions and actions in the  
12 Delta. The draft adaptive management plan appears to provide for no participation by the  
13 general public and legal users of water to evaluate potential injury. In fact, the proposed  
14 adaptive management plan virtually ignores water quality and other legal users of water.

15 Neither the hearing officers nor project proponents objected to Mr. Jennings’s  
16 restatement of his adaptive management comments during his oral testimony.

17 Mr. Jennings’s testimony and exhibits regarding the history and effectiveness of adaptive  
18 management in the Bay-Delta are relevant and reliable since he based his analysis on exhibits  
19 that provide the foundation for his opinion that adaptive management has failed to prevent injury  
20 in the Bay-Delta in the past. It would be unfair to allow project proponents to testify how  
21 adaptive management will prevent injury to legal users of water but to disallow Mr. Jennings to  
22 provide information that adaptive management as proposed would not address or prevent injury  
23 to legal users of water.

24 Mr. Jennings’ modified testimony in CSPA-2-Revised-2 is within the scope of Part 1 of  
25 the hearing and in conformance with the Hearing Officers’ ruling on scope, and should be  
26 allowed.



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**STATEMENT OF SERVICE**

**CALIFORNIA WATERFIX PETITION HEARING**  
**Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

**RESPONSE TO THE OBJECTIONS OF SAN LUIS AND DELTA-MENDOTA WATER AUTHORITY AND THE DEPARTMENT OF WATER RESOURCES TO THE EXHIBITS OF CSPA ET AL. (AQUALLIANCE, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE AND CALIFORNIA WATER IMPACT NETWORK) FOR PART 1B**

To be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated 15 November 2016, posted by the State Water Resources Control Board at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

I certify that the foregoing is true and correct and that this document was executed on 6 January 2017.



Signature: \_\_\_\_\_  
Name: Bill Jennings  
Title: Executive Director  
California Sportfishing Protection Alliance

Party/Affiliation:  
CSPA et al. (California Sportfishing Protection Alliance  
AquAlliance, California Water Impact Network)

Address:  
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Stockton, CA 95204